Supreme Court, U.S.
F I L E D
AUG 21 1997
CLERK

No. 97-148

SUPREME COURT OF THE UNITED STATES

October Term, 1996

---

THE ARIZONA DEPARTMENT
OF CORRECTIONS, *et al.*,
*Petitioners,*

v.

EVAN ARTHUR HOOK, *et al.*,
*Respondents.*

---

**Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit**

**Brief in Opposition**

---

Elizabeth Alexander
*Counsel of Record*
National Prison Project
of the ACLU Foundation
1875 Connecticut Avenue, N.W.
Suite 410
Washington, D.C. 20009
(202) 234-4830

Alice Bendheim
1542 West McDowell Road
Phoenix, Arizona 85007
(602) 253-2954

Counsel for Respondents,
Plaintiffs in *Casey v. Lewis*,
No. CIV 90-00054 (PHX RGS)
(D. Ariz.)

## QUESTION PRESENTED

Is the passage of a state statute that purports to prohibit state officials from paying the expenses of all special masters appointed by federal courts a changed circumstance requiring a federal court to stay existing orders of reference, when the federal court finds that continuation of the orders of reference is necessary to the vindication of constitutional rights?

TABLE OF CONTENTS

QUESTION PRESENTED . . . . . i

TABLE OF AUTHORITIES . . . . . iii

STATEMENT OF THE CASE . . . . . 1

A. General Litigation . . . . . 1

B. Mental Health Findings . . . . . 1

C. Development of the Mental Health Remedy . . . . . 2

D. The Arizona Statute . . . . . 2

E. The Motions for Modification and Contempt . . . . . 4

REASONS FOR DENYING THE WRIT . . . . . 5

I. THE DISTRICT COURT APPROPRIATELY REFUSED TO MODIFY THE INJUNCTION ON THE BASIS OF THE ARIZONA STATUTE . . . . . 5

A. A State Statute Cannot Command Disobedience to Federal Law . . . . . 5

B. The Petitioners Failed to Demonstrate that Mere Passage of the Statute Constitutes a Changed Circumstance Justifying Modification . . . . . 10

1. There Was No Change in the Facts Justifying Relief . . . . . 10

2 There Was No Change in Law Justifying Relief . . . . . 11

C. Because Petitioners Failed to Justify Any Modification, the District Court Was Not Required to Consider Any Remedial Alternatives . . . . . 12

D. In Any Event, the Special Masters Remained Necessary to Provide an Effective Remedy . . . . . 12

II. THIS CASE PRESENTS NO ISSUE WORTHY OF REVIEW ON WRIT OF CERTIORARI . . . . . 13

CONCLUSION . . . . . 15

# TABLE OF AUTHORITIES

Cases

Board of Educ. v. Dowell,
498 U.S. 237 (1991) . . . . . 11

Clark v. Coye, 60 F.3d 600
(9th Cir. 1995) . . . . . 13, 15

Cooper v. Aaron, 358 U.S. 1
(1958) . . . . . 6, 7, 10

King v. Greenblatt, 52 F.3d 1
(1st Cir.), cert. denied,
116 S. Ct. 175 (1995) . . . . . 13, 14, 15

Missouri v. Jenkins, 495 U.S. 33
(1990) . . . . . 9

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) . . . . . 10, 11, 12

Washington v. Washington State
Commercial Passenger Fishing
Vessel Ass'n, 443 U.S. 658
(1978) . . . . . 7, 8

Statutes and Constitutional Provisons

U.S. Const. art. V1, § 2 . . . . . 8, 10

U.S. Const. amend. VIII . . . . . 1,2

Fed. R. Civ. P. 60(b)(5) . . . . . 10

Sup. Ct. R. 10(a) . . . . . 15

Ariz. Rev. Stat. § 35-152 . . . . . passim

## STATEMENT OF THE CASE

### A. General Litigation

The Complaint in this case was filed on January 6, 1990 by a class of all prisoners in the custody of the Arizona Department of Corrections. Among other things, the plaintiffs-respondents (hereinafter respondents) claimed that defendants-petitioners (hereinafter petitioners) had deprived them of their constitutional rights to medical and mental health care under the Eighth Amendment (*see Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1993)) and their right of access to the courts. *See Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1993), *aff'd in part and vacated and remanded in part*, 43 F.3d 1261 (9th Cir. 1994), *rev'd*, 116 S. Ct. 2174 (1996).

At various points, the district court appointed special masters in all three areas. This Court reversed the remedial order regarding legal access in *Lewis v. Casey*, 116 S. Ct. 2174 (1996), and the special master regarding medical issues has also been discharged by the district court. The special master regarding mental health issues, Cassandra Newkirk, M.D., continues to perform her duties. Accordingly, respondents describe below the findings justifying the relief regarding the mental health issue.

### B. Mental Health Findings

The district court concluded that the petitioners are deliberately indifferent to the mental health needs of Arizona prisoners and thus violate the Eighth Amendment on the basis of factual findings that defendants fail to identify seriously mentally ill prisoners in their custody (*Casey*, 834 F. Supp. at 1513); as a result seriously mentally ill prisoners do not receive treatment (*id.*); there is a shortage of mental health staff resulting in failures to meet the serious mental health needs of prisoners (*id.* at 1524-25); prisoners with serious mental health problems experience delays in receiving treatment that cause the prisoners to endure unnecessary psychological pain (*id.* at 1526); seriously mentally ill prisoners are

routinely placed in maximum security lockup units rather than mental health units (*id.* at 1529); and patients have their psychotropic medications stopped without face-to-face evaluations, causing patients to decompensate. (*Id.* at 1536). In support of its findings, the district court cited several score individual cases (*see generally id.* at 1513-37) including cases in which acutely psychotic patients went untreated for substantial periods of time. *See, e.g., id.* at 1513-16.

C. Development of the Mental Health Remedy

In its decision finding that mental health care violated the Eighth Amendment, the district court ordered that the parties attempt to agree upon a remedy, *id.* at 1552-53, and the parties resolved most of the remedial issues by agreement. The district court thereafter referred the remaining remedial issues to a Magistrate Judge.

The Magistrate Judge made recommendations to the district judge regarding the remaining issues, and those recommendations were accepted by the district court. *Casey*, No. 90-00054 (D. Ariz. July 25, 1995) (order). The mental health special master was originally appointed on January 24, 1995. *Id.* (Jan. 24, 1995) (order).

D. The Arizona Statute

On April 19, 1995, the Arizona Legislature enacted Ariz. Rev. Stat. § 35-152, effective July 13, 1995, which purported to prohibit any state officer or employee from paying the fees and expenses of any special master appointed by a federal court without a specific legislative appropriation. Passage of this legislation was actively promoted by Samuel A. Lewis, the former Director of the Arizona Department of Corrections. Petitioner Lewis "was a key supporter of the legislation [who] urged the state legislature to enact the measure for the specific purpose of asserting "state's rights" and

challenging the federal district court's actions in prisoner cases." Pet. App. C at 49. Indeed, Lewis testified at the legislative hearing on the bill as follows: "I believe that this is a case of state's rights. I think it is [ ]time for us to find out exactly where the power of the federal government begins and ends so that the Department simply becomes the instrument by which we attack this in the courts." *Id.* at 49 n.15. State legislators acknowledged that the intent of the Arizona statute was to set up a confrontation between state and federal authorities. *Id.* at 50.

The statute became effective on July 13, 1997. Pursuant to standard practice, the first special master bill affected by the statute was submitted on August 1.[1] Indeed, on August 3, 1995, the petitioners were sent a *Casey* special master bill by their counsel, who notified petitioners that they had until August 16 to comply with the federal court order.[2] There is no evidence in the record that Lewis took any action related to securing payment of this bill prior to a letter dated August 10, 1995, in which he purported to ask that payment of the bill be placed on the agenda of the Joint Legislative Budget Committee for August 17, 1995, one day after compliance was due. In the letter, Lewis noted that the deadline for agenda items had passed.[3] The response from the Chairman of the Committee on August 14, 1996 was that the request would have to wait until January, 1996 when the legislature returned.[4] On August 23, 1995, after Lewis was already in non-compliance with the federal court order, he sent a letter to the Governor asking that a special session of the legislature be convened.[5]

In addition to this case, the Arizona statute also affected

---

[1] Def. Resp. to Pl. Pet. for an Order to Show Cause at 2 (Aug. 28, 1995) Exh. KK.

[2] *Id.*, Exh. LL.

[3] *Id.*, Exh. MM.

[4] *Id.*, Exh. NN.

[5] *Id.*, Exh. OO.

special masters appointed in two other cases, *Hook v. Arizona*, No. CIV 73-0097 PHX CAM (D. Ariz.) and *Gluth v. Arizona Dep't of Corrections*, No. CIV 84-1626 PHX CAM (D. Ariz.). *Hook* involves a first amendment challenge to the correspondence rules of the Arizona Department of Corrections; *Gluth* involves legal access at the Central Unit of the Florence Complex of the Arizona Department of Corrections. Proceedings in *Hook*, *Gluth* and this case were consolidated for purposes of the litigation arising as a result of the passage of the Arizona statute. In all three cases the petitioners had a history of deliberate noncompliance with federal court orders. *See* Pet. App. C at 41, 45, 47.

E. The Motions for Modification and for Contempt

On August 16, the day compliance was due, the petitioners filed a motion to modify the various injunctive orders, and on August 18 the *Hook* and *Gluth* respondents filed motions for orders to show cause why the petitioners should not be held in contempt.

The petitioners' motion to modify the injunction asked for the district court's assistance "in light of the conflict between the Court's order and the statutory prohibition facing defendants." Defs.' Mot. for Modification at 2 (Aug. 16, 1995). In particular, petitioners' motion did not ask that the special masterships be abolished or the remedies reformulated. Rather, petitioners' specific request was as follows:

> Defendants request that the Court modify its orders regarding the timing of payments of the fees and expenses of the special masters to allow presentment of the statements to the Arizona Legislature as required by state law. A.R.S. § 35-152.

Mem. of P. & A. in Supp. of Mot. to Modify at 5 (Aug. 16, 1995).[6]

Because the district judge had recused himself from hearing the matter, the petitioners' motion was heard by the Honorable David Ezra from the District of Hawaii. Judge Ezra denied the motion to modify, held the state statute unconstitutional, and held Director Lewis guilty of civil contempt. *See* Pet. App. C. As the sanction for the contempt, the district court ordered a coercive civil contempt sanction of $10,000 per day if the petitioners failed to comply with the *Hook* and *Gluth* special master orders, and ordered that petitioners pay the respondents' attorneys' fees.[7] *See* Pet. App. B. The Ninth Circuit Court of Appeals issued an amended order on April 22, 1997 affirming the district court and denying rehearing.

## REASONS FOR DENYING THE PETITION

### I. THE DISTRICT COURT APPROPRIATELY REFUSED TO MODIFY THE INJUNCTION ON THE BASIS OF THE ARIZONA STATUTE

#### A. A State Statute Cannot Command Disobedience to Federal Law

The fundamental error in petitioners' argument is the claim that a state, by passing a statute prohibiting compliance with a federal court order, can thereby avoid the necessity of complying

---

[6] Contrary to the statement on page 5 of the petition for writ of certiorari, the petitioners' motion did not suggest the replacement of the special masters with a magistrate judge. The sole rationale for the motion to modify was the existence of the new statute.

[7] Following the district court's determination that petitioner Lewis was in contempt, the parties reached agreement on a modification of the order of reference appointed the mental health special master, and the district court issued the modified order on December 14, 1995.

with that order. Such a claim flies in the face of almost two hundred years of constitutional history. While the payment of the fees of special masters may seem a less lofty cause than the cause of equal justice under the law, the principle implicated by the lower courts in this case is no different from the principle at stake in *Cooper v. Aaron*, 358 U.S. 1 (1958).

In *Cooper*, the State of Arkansas had amended its Constitution to command the State's Attorney General to oppose the "unconstitutional decisions" of the Supreme Court with regard to school desegregation. The State also passed various statutes with the goal of hindering integration, and the Governor sent the state National Guard to prevent the court-ordered integration of Central High School in Little Rock. Thereafter, the school board officials asked for a delay in integration because of the hostility to the court's order engendered by the actions of the Governor and Legislature. The district court granted the requested relief. The court of appeals reversed, and the Supreme Court granted a writ of certiorari.

This Court accepted the representation of the school board officials that they had acted in good faith. *Id.* at 15.[8] Despite the fact that the state officials had not personally attempted to obstruct the orders of the federal court, the Supreme Court unanimously ruled that the actions of the Governor and Legislature provided no defense to the orders:

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United

---

[8] In contrast, of course, petitioner Lewis sought enactment of the Arizona statute at issue here and does not come to the Court with clean hands.

> States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery...." United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases...." *Sterling v. Constantin*, 287 U.S. 378, 397-398 [(1932)].

358 U.S. at 18-19 (internal quotation marks omitted).

This Court applied the central principle of *Cooper*, that a state cannot prevent compliance with federal court orders by prohibiting state officials from obeying the orders, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1978). In *Washington*, an injunction entered by the federal district court required the state Department of Fisheries to adopt certain regulations regarding fishing rights. After the federal injunction was issued, the state Supreme Court, in separate litigation, forbade the Department of Fisheries from complying with the federal injunction. The district court then issued a series of orders allowing federal agencies to supervise directly the state's fisheries consistent with its injunction. That series of orders was affirmed by the court of appeals and this Court granted certiorari "to remove any doubts about the federal court's power to enforce its orders." *Id.* at 674. The Court's decision broadly reaffirmed the rule of *Cooper*:

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States

> Constitution. *Cooper v. Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L.Ed.2d 5; *Ableman v. Booth*, 21 How. 506, 16 L.Ed. 169. It is also clear that Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so.
>
> * * *
>
> Whether Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. It is therefore absurd to argue, as do the fishing associations, both that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision. The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court.

*Washington*,443 U.S. at 695-96 (citations omitted).

Petitioners' claim that the issue here is that federal courts should not displace state law unless there is no alternative, *see* Pet. at 2-3, thus has the facts precisely backwards. This is a case of a state attempting to nullify federal law, and the Supremacy Clause precludes such overreaching.

Finally, of course, this case would present different issues if it involved the application of a neutral state statute generally requiring specific authorization for expenditures for non-budgeted items. The issues would also be different if a federal court were initially formulating an injunction in light of existing state law rather than dealing with a statute passed with the intent of defying the court. In this case, however, the conflict was entirely the product of the petitioners' deliberate choices. Petitioners could have moved to modify the orders in April 1995 after the statute was passed; they could thus have attempted to use the three-month period to effect a remedial transition without disruption. Alternately, in April, while the legislature was in session, the petitioners could have attempted to arrange an appropriation in advance for payment of the special masters' anticipated bills. Obviously, they took no such steps. Equally obviously, they took no such steps because to have done so would have impeded the announced legislative purpose of the statute -- the disruption of the remedies imposed by the federal court and the provocation thereby of a confrontation between state government and local authorities. Thus, contrary to the suggestion on page 3 of the Petition, the lower court orders in this case are entirely consistent with *Missouri v. Jenkins*, 495 U.S. 33, 57-58 (1990) (footnote omitted):

> Even though a particular remedy may not be required in every case to indicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy.

B. The Petitioners Failed to Demonstrate that Mere Passage of the Statute Constituted a Changed Circumstance Justifying Modification

1. There Was No Change in the Facts Justifying Relief

This Court very recently provided detailed guidance to lower federal courts regarding the appropriate standards for determining whether a modification of an injunction should be granted at defendants' behest in a prison or jail conditions of confinement case. Even aside from the Supremacy Clause considerations reflected in *Cooper*, this Court's standards for equitable modification demonstrate the correctness of the district court's decision.

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court held that, pursuant to Fed. R. Civ. P. 60(b)(5), a party seeking modification of a consent decree may meet its initial burden by showing a significant change in the facts or in the applicable law. 502 U.S. at 384.[9]

It is hard to imagine a change in circumstances less appealing as a justification for a modification of a final equitable decree than a statute that purports to disable state officials from complying with an existing order. "Rule 60(b)(5) provides that a party may obtain relief from a court order when it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with the terms of a consent decree." *Rufo*, 502 U.S. at 383. If "lack of convenience" cannot justify a modification, *a fortiori* an unvarnished intent to avoid compliance cannot qualify. Nor was passage of the statute

---

[9] While *Rufo* involved a consent decree, there is no reason for this Court to apply a different standard to litigated decrees; motions to modify litigated injunctive decrees, like consent decrees, are subject to Fed. R. Civ. P. 60(b)(5).

consistent with a "reasonable effort to comply with the decree," *see id.* at 385.

Indeed, the central thrust of respondents' argument is the assertion that a state defendant's distaste for an unappealed injunctive order, if transformed into a state-law impediment to compliance, can require the federal court in essence to retry the merits of an existing remedial order. *See* Pet. at 12 ("More important is that neither the district court nor the court of appeals decided anew the proper balance between the federal injunctions at issue and the new state law.") (Emphasis added).

If such a principle were accepted, there would be no end to the resulting mischief, as defendants would have a substantial incentive to frustrate federal court orders through the creation of state law impediments and to entitle themselves thereby to reconsideration of an order they had come to dislike. Moreover, rewarding defendants for attempting to avoid compliance with a federal court order would be flatly inconsistent with the Court's admonition in *Board of Education v. Dowell*, 498 U.S. 237, 249-50 (1991), that a district court, in determining whether to dissolve or modify a school desegregation decree, should consider whether the defendants had complied in good faith with the decree.

### 2. There Was No Change in Law Justifying Relief

*Rufo* also holds that a change in law may warrant modification of an institutional injunction. Significantly, however, in *Rufo*, the Court specified that the change must be one of federal law:

> A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law.

502 U.S. at 388.

In addition, *Rufo* states that modification may be warranted "when the statutory or decisional law has changed to make legal what the decree was designed to present." *Id.* at 398. This branch of the *Rufo* standard also provides no assistance to petitioners, because, even aside from supremacy considerations, the statute in no sense makes legal anything that the order for payment was designed to prevent.

C. Because Petitioners Failed to Justify Any Modification, the District Court Was Not Required to Consider Any Remedial Alternatives

Under *Rufo*, only if the defendants carry their burden to show that changed factual or legal circumstances justify a modification is the court required to consider alternatives to the existing court order. *Id.* at 311. Because the petitioners did not carry their burden to demonstrate a changed circumstance, the district court was not required to consider whether there were any alternatives to the continued appointment of a special master.

D. In Any Event, the Special Masters Remained Necessary to Provide an Effective Remedy

Regardless of whether the district court was required to reevaluate the continuing necessity of the special master orders of reference, in fact the district court did so. The district court concluded that the oversight and expertise of the special masters continued to be necessary to remedy ongoing constitutional violations at various state prisons. Pet. App. C at 57 n.20. Petitioners argue that the district court's only basis for this conclusion was the statement of one of the special masters that a modification might threaten to undermine the substantive provisions of the injunctions. Pet. at 12. In fact, however, it is apparent that granting the petitioners' motion to suspend the payment orders

would have resulted in no source for payment of the special master's bills for the period from July 1, 1995 through the beginning of 1996, when the legislature would return. *See supra* at 9. The evidence submitted to the district court indicated that this disruption of payment would cause the special masters' offices to close down. Pet. App. C at 72 n.34. Accordingly, because of the petitioners' deliberate acts, *see supra* Part I.A., the statute had the necessary effect of disrupting the implementation of the remedies, and the district court did not abuse its discretion in denying modification.[10]

## II. THIS CASE PRESENTS NO ISSUE WORTHY OF REVIEW ON WRIT OF CERTIORARI

Petitioners argue in a section heading that this case involves "important and novel questions of federalism" and that review is necessary to correct the lower courts' misapplication of this Court's prior decisions. Pet. at 8. For the reasons set forth in Section I, *supra*, there is no merit to these assertions.

Nor is there any conflict among the circuits that could justify the grant of a writ of certiorari. Petitioners assert that two lower court decisions, *King v. Greenblatt*, 52 F.3d 1 (1st Cir.), *cert. denied*, 116 S. Ct. 175 (1995), and *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995) are inconsistent with the decision below. Neither case conflicts with the decision below, and certainly there is no intercircuit conflict meriting review by this Court.

In *King*, the Court of Appeals for the First Circuit considered an appeal by the state defendants of an order refusing to

---

[10] Petitioners did not attempt to argue, and were not entitled to argue, that passage of the Arizona statute entitled them to relitigate the conclusion of the trial court that their failure to provide mental health care violated the Constitution. Nor should passage of a state statute like the one at issue here allow a defendant to reconsider its previous consent to entry of judgment without trial.

modify a consent decree involving a sexual offender treatment center. At the time the consent decree had been signed, the state Department of Mental Health ran the Center. A later state statute transferred authority to the Department of Corrections. The state officials sought a modification of the consent decree to reflect the state's revised administrative structure. The district court refused the requested modification, and the court of appeals vacated and remanded. The rationale for this ruling was that the provisions at issue were a direct product of state law that had since been revised. As the First Circuit explained:

> In the context of [this case], the structural terms may have been a means to a constitutional end; but it was possible to include them in the decree only because Massachusetts law already structured the Treatment Center in the same way. If existing state law had granted DOC exclusive jurisdiction over the Treatment Center, the parties could not have agreed to insert DMH into the administrative structure. Thus, a change in the very law underlying the structured terms is likely to be "significant" under *Rufo*, and may therefore require some modification of the structural terms.

52 F.3d at 5. In contrast, the appointment of the special masters here, and the state's obligation to pay the masters' fees, are by no means creatures of state law; they are entirely a creature of federal law and that federal law has not been revised. An analogy to the situation in *King* would have arisen if the Arizona legislature had decided to designate some other agency to pay the bills of the federal special master. Under such circumstances, a modification of the order appointing the special master would be justified to designate a new state officer for payment purposes unless the actual effect of the legislation was to impede payment of the special master.

Moreover, *King* does not conflict with the decision below on an entirely separate ground. *King* held that the district court on remand should determine whether, as a practical matter, the state law change would affect the eradication of the constitutional violations that gave rise to the consent decree. *Id.* Here, by contrast, the lower courts have already found that retention of the special masters was necessary to the vindication of constitutional rights. *See* Pet. App. A at 17; Pet. App. C at 58-59. Accordingly, petitioners' claim (Pet. at 7) that the lower courts "did not find that the prisoners' federal rights would be frustrated" by allowing the modification is refuted by the record and nothing in *King* presents an intercircuit conflict.

Similarly, *Clark v. Coye* suggests no grounds for the grant of certiorari in this case. First, of course, because *Clark* comes from the Ninth Circuit, by definition it cannot present an intercircuit conflict justifying review on writ of certiorari. *See* Sup. Ct. R.10(a). Moreover, the decision in *Clark* does not conflict with the decision below.

In *Clark* the court found that there was no conflict between a federal court order and subsequent state legislation so that the district court's interpretation of the order as conflicting with the legislation amounted to a modification of the order. Here, even petitioners concede that the injunction and the state statute are flatly inconsistent. Furthermore, *Clark* did not direct the district court to modify the injunction; rather, the court stated that a modification should occur only if the standard for modification is met, a question as to which the court explicitly "express[ed] no opinion." 60 F.3d at 605. Accordingly, *Clark* suggests no reason to grant certiorari in this case.

## CONCLUSION

Respondents respectfully urge the Court to deny the petition for writ of certiorari.

Respectfully submitted,

Elizabeth Alexander
National Prison Project
of the ACLUF
1875 Connecticut Avenue, NW
Suite 410
Washington, DC 20009
(202) 234-4830

Alice Bendheim
1542 West McDowell Road
Phoenix, Arizona 85007
(602) 253-2954